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No. 08-448

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *ET AL.*,
Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a challenge to Cablevision's proposed Remote Storage Digital Video Recorder ("RS-DVR"), which consumers would use to record and play back television programs, just as they currently do with a VCR or conventional DVR. As with a VCR or DVR, each consumer makes a separate recording, and each recording can be viewed only by the consumer who made it. The principal difference is that, with the RS-DVR, the recordings are stored in a remote location. The questions presented are:

1. Whether Cablevision would directly infringe petitioners' reproduction rights when consumers decided what programs to record and used the RS-DVR to record them.

2. Whether Cablevision would directly infringe petitioners' reproduction rights because the RS-DVR—like all digital devices—momentarily stores and then overwrites tiny snippets of program data in transient data buffers.

3. Whether Cablevision would directly infringe petitioners' public performance rights when consumers used the RS-DVR to play back their own separate recordings to themselves.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

1. Cablevision Systems Corporation has no parent corporation. The following publicly held corporations own 10% or more of Cablevision Systems Corporation's stock: (1) Legg Mason, Inc. (through ClearBridge Advisors, LLC, and Smith Barney Fund Management LLC, as a group); and (2) T. Rowe Price Group, Inc.

2. CSC Holdings, Inc. is a wholly owned subsidiary of Cablevision Systems Corporation and is not publicly traded.

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BRIEF IN OPPOSITION

INTRODUCTION

For decades, consumers have lawfully used various technologies—from the Betamax, to VHS VCRs, to digital video recorders ("DVRs")—to record television programs for later viewing. This case involves a challenge to Cablevision's proposed "Remote-Storage" DVR ("RS-DVR"), which consumers would use for the same lawful purpose. The principal difference is that, when a consumer records a program using the RS-DVR, the recording is stored in a remote location. Presumably recognizing that the lawfulness of the consumer conduct here forecloses any contributory infringement claim, pe-

titioners alleged only that Cablevision, by offering that new technology, would itself *directly* infringe their copyrights. The Second Circuit correctly rejected that claim.

The petition fails to identify any colorable conflict with another decision. And while petitioners claim that the Second Circuit's decision will disrupt the marketplace, they identify no existing technology that will improperly escape liability based on the court's ruling, resorting instead to hypothetical technologies that should be left for future courts to address if they arise. Petitioners, moreover, nowhere explain why the robust doctrine of contributory infringement is inadequate to address their hypotheticals and, more generally, the intentional facilitation of unlawful copying they purport to fear. In the unlikely event that the full range of infringement doctrines proves insufficient, there will be time enough for this Court to intervene. But there is no reason to grant review in a narrow case involving only direct-infringement claims and *lawful* consumer copying.

STATEMENT

I. BACKGROUND

A. Statutory Framework

The Copyright Act grants authors exclusive rights "to do" six specified things with their works, including "to reproduce the copyrighted work in copies" and "to perform the copyrighted work publicly." 17 U.S.C. § 106(1), (4). Absent an exception such as fair use, anyone who exercises one of the author's exclusive rights without permission infringes the author's copyright. See *id.* § 501(a).

Courts have also long invoked doctrines such as contributory infringement to "impos[e] * * * liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). Contributory infringement occurs when

someone "intentionally induc[es] or encourag[es] direct infringement" by another. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Providing the "means" to permit another person to infringe—such as the equipment he uses to make copies—is a classic example. See 3 *Nimmer on Copyright* § 12.04[A][3][b], at 12-86.1 to -105 (2008) ("Nimmer"); 2 *Goldstein on Copyright* § 8.1.2, at 8:14-18 (3d ed. 2008) ("Goldstein"). Because contributory infringement requires underlying direct infringement by someone else, a defendant cannot be liable for contributing to *lawful* copying. See Pet. 21 (citing *Sony*, 464 U.S. at 434).

B. Consumer Time-Shifting

Since Sony introduced the Betamax VCR in 1976, consumer "time-shifting"—recording television programs for later viewing—has been a fixture of the American entertainment landscape. In *Sony*, this Court held that consumer time-shifting is non-infringing fair use, observing that it merely enables a viewer to watch at a later time a program he was already "invited to witness in its entirety." 464 U.S. at 447-455. Because consumer time-shifting is lawful, Sony could not be liable for contributory infringement. See *id.* at 434-456. There are now about 100 million VCRs in U.S. homes. C.A. App. 828.

The VCR's technological successor, the DVR, was introduced in the 1990s. Pet. App. 50a. While VCRs record programs onto magnetic tape, DVRs record them digitally on a hard drive. *Ibid.* Many cable companies offer "set-top DVRs" that combine the functions of a cable set-top box and a DVR. *Ibid.* Cable and satellite companies now provide more than 27 million set-top DVRs to American homes. See Pasztor, *Study Projects Greater Reliance of Cable-TV Subscribers on DVRs*, Wall St. J. Online, July 16, 2007.

Cable companies typically charge an additional monthly subscription fee for use of the DVR, while retaining ownership and all maintenance and repair responsibilities. C.A. App. 1173-74; C.A. Confid'l App. 195. Subscribers are prohibited from opening set-top DVRs to access their contents, and security measures are used to prevent unauthorized access or use. C.A. App. 959, 1173; C.A. Confid'l App. 1037.

II. THIS LITIGATION

A. The RS-DVR

Respondents Cablevision Systems Corporation and CSC Holdings, Inc. ("Cablevision") provide cable television service primarily in the New York area, carrying approximately 170 channels under licenses with programmers. See Pet. App. 46a, 53a. For years, Cablevision has offered set-top DVRs to its subscribers. *Id.* at 51a. Set-top DVRs, however, have shortcomings. For example, Cablevision must install an individual unit with an expensive hard drive in each home, and repairs require disruptive house calls. See C.A. App. 768.

Cablevision therefore developed the RS-DVR. The primary difference between the RS-DVR and a traditional DVR is where the recordings are stored. With a set-top DVR, recordings are stored on a hard drive in the set-top box. Pet. App. 50a. With the RS-DVR, each customer's recordings are stored on hard drives in a central location. *Id.* at 51a-52a.

"To the customer, * * * the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR." Pet. App. 6a. With both systems, the customer can record a program by pressing "record" when watching television or by scheduling the recording in advance from an on-screen guide. See *ibid.* With both systems, the customer can then play back his recording by selecting it from an on-screen list. See *ibid.* The remote

controls and on-screen interfaces subscribers use to operate Cablevision's RS-DVR and set-top DVRs are identical. See *id.* at 51a.

Like a VCR or set-top DVR, the RS-DVR responds "automatically" to consumer commands, "with no human intervention or decision-making" by any Cablevision employee. C.A. App. 116, 119, 121.[1] Like those other devices, moreover, the RS-DVR records only programs the customer chooses to record, and makes recordings only from the real-time television programming stream. See Pet. App. 4a-5a, 59a. Consequently, the customer can record only programs he could have watched on television, and the recordings can be made only as the programs are telecast. See *id.* at 4a-6a.

When customers record programs with VCRs or set-top DVRs, each customer ends up with a separate copy. The same is true with the RS-DVR: If 1,000 people record an episode of "The Wire," 1,000 separate recordings are made. Pet. App. 58a. A customer cannot play back anything but the programs he recorded, and no other customer can access his recordings. *Id.* at 6a, 59a-60a.

Finally, both set-top DVRs and the RS-DVR use transient data buffers that momentarily store and process tiny snippets of program data as it travels through the system. See Pet. App. 5a; C.A. App. 1169-1171. That data is constantly overwritten as new data flows in. Pet. App. 5a. Buffering is not unique to DVRs: "All digital devices * * * utilize transient data buffers." *Id.* at 54a.

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[1] Petitioners' assertion that "Cablevision employees must staff the 'RS-DVR' system around the clock to operate and maintain it" (Pet. 11) is inaccurate. Cablevision's facility is staffed at all times, but the employees do not "operate" the RS-DVR—they are there to fix it if it breaks. See C.A. App. 1205-1206; C.A. Confid'l App. 732-734, 750.

B. Proceedings in District Court

Petitioners own copyrights in programs appearing on Cablevision's cable system. Pet. App. 45a-46a. In 2006, they brought this action to enjoin Cablevision from offering the RS-DVR. *Id.* at 60a. They claimed that Cablevision would infringe their exclusive right to reproduce their works in two respects—first, when customers used the RS-DVR to record programs; and second, when the RS-DVR momentarily buffered data. *Id.* at 63a-64a. They further alleged that Cablevision would infringe their right to perform their works publicly when customers played back their recordings. *Id.* at 75a. Early in the litigation, petitioners stipulated that they were claiming only *direct* infringement, thus waiving any theory that Cablevision was *indirectly* liable for consumer copying. See *id.* at 61a. Cablevision agreed that it would not assert any fair-use defense to those direct-infringement claims. *Ibid.*

The district court granted summary judgment to petitioners. Because petitioners claimed only direct infringement, the parties "agree[d]" that, with respect to recording, the dispositive question is "*who* makes the copies," Cablevision or its customers. Pet. App. 64a-65a. The court concluded that Cablevision made the copies and thus would infringe petitioners' reproduction rights. *Id.* at 72a. The court also held that Cablevision would infringe petitioners' reproduction rights when program data passed through the buffers, *id.* at 72a-74a, and would infringe petitioners' public performance rights when customers played back their recordings, *id.* at 75a-80a.

C. The Second Circuit's Decision

The Second Circuit (*Walker*, Sack, and Livingston, JJ.) unanimously reversed. Pet. App. 1a-42a.

1. The Second Circuit rejected petitioners' claim that Cablevision would directly infringe when customers used

the RS-DVR to record programs. The court of appeals agreed that, because petitioners asserted only direct infringement, the critical question was "*who* made th[e] copy." Pet. App. 19a. "If it is Cablevision, plaintiffs' theory of direct infringement succeeds; if it is the customer, plaintiffs' theory fails because Cablevision would then face, at most, secondary liability, a theory of liability expressly disavowed by plaintiffs." *Ibid.*

To resolve that question, the court endorsed a standard first articulated in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), and followed in cases such as *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). Pet. App. 19a-23a. That standard focuses on the "volitional conduct that causes the copy to be made." *Id.* at 20a. The court concluded that the customer rather than Cablevision supplied that volitional conduct here by "ordering [the RS-DVR] to produce a copy of a specific program." *Id.* at 20a-21a.

"In the case of a VCR," the court observed, "it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or * * * owns the machine." Pet. App. 20a-21a. An RS-DVR user is not "sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party." *Id.* at 21a. The court also relied on an analogy to a copy-shop that provides self-service photocopiers that customers can operate themselves to make copies. See *id.* at 22a. The only person who "does" the copying with such a machine, the court recognized, is the customer, not the proprietor who makes the machine available for customer use. See *ibid.*

The court declined to decide whether, in other circumstances, "one's contribution to the creation of an infring-

ing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." Pet. App. 26a. It held only that, "on the facts of this case, copies produced by the RS-DVR system are 'made' by the RS-DVR customer." *Id.* at 26a-27a. The court emphasized that its holding would not immunize defendants who facilitated *unlawful* copying because "the doctrine of contributory liability stands ready to provide adequate protection." *Id.* at 24a.

2. The Second Circuit also rejected petitioners' claim that the RS-DVR's momentary data buffering would infringe their reproduction right. As the court explained (Pet. App. 10a-11a), that right is not infringed unless the defendant produces "copies"—material objects in which a work is "fixed." 17 U.S.C. §§ 101, 106(1). "A work is 'fixed' * * * when its embodiment in a copy * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*" *Id.* § 101 (emphasis added). Stressing that its inquiry was "necessarily fact-specific," the court held that the RS-DVR's buffer data does not meet that "more than transitory duration" requirement. Pet. App. 17a-18a. "No bit of data," the court noted, "remains in any buffer for more than a fleeting 1.2 seconds." *Id.* at 17a. And "each bit of data here is rapidly and automatically overwritten." *Ibid.*

3. Finally, the court held that allowing customers to use the RS-DVR to play back their own recordings would not infringe petitioners' public performance right. The relevant definition required petitioners to show that Cablevision would "transmit * * * a performance * * * of the work * * * *to the public*." 17 U.S.C. § 101 (emphasis added). The crucial inquiry was therefore "who precisely is 'capable of receiving' a particular transmission of a performance." Pet. App. 30a. "[B]ecause the RS-DVR sys-

tem, as designed, only makes transmissions to one subscriber using a copy made by that subscriber," the court held, "the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." *Id.* at 36a. The court accordingly held that allowing a customer who recorded a program—and *only* that customer—to play back his *own* recording was not a "public" performance. See *id.* at 39a.

REASONS FOR DENYING THE PETITION

The Second Circuit decided three focused issues of direct infringement under the Copyright Act. With respect to each one, the court followed the plain meaning of the statute and applied it correctly to the narrow circumstances of Cablevision's system—a remote-storage version of the VCRs and DVRs that consumers have used for decades. Those rulings do not conflict with any decision of this Court or any other court of appeals. This case is thus entirely unlike the cases—*Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005), and *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)—that petitioners invoke to justify review. Pet. 15-16. Those cases raised issues that squarely divided the circuits. See Pet. in No. 04-480, at 24-29 (*Grokster*); *Acuff-Rose Music, Inc.* v. *Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting).

Lacking a serious claim of conflict, petitioners and their *amici* vociferously proclaim that the case is important because it will lead to rampant illegal copying. But those predictions have no foundation. Petitioners ignore the robust doctrine of contributory infringement, which is designed to address precisely the situations petitioners purport to fear—the provision of systems that promote and facilitate *illegal* copying. Petitioners did not claim contributory infringement here, but they cannot pretend

the doctrine does not exist. Moreover, the Second Circuit's direct-infringement rulings were limited and do not prejudge any of petitioners' hypothetical technologies.

The RS-DVR does not allow consumers to do anything they cannot already lawfully do with other devices. Since *Sony Corporation of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), consumers have had a fair-use right to record television programs for later viewing. Petitioners' description of the RS-DVR as a "service that automatically copies [their] copyrighted television programming and then transmits those programs to subscribers on request" (Pet. 1) is misleading. Like VCRs and standard DVRs, the RS-DVR does not record any programs on its own. Rather, *consumers* use the RS-DVR to record programs as they air, using the same handheld remote control and on-screen interface used to operate a traditional DVR. And each recording is available for playback *only* to the customer who made it.

Petitioners also misread the Second Circuit's decision when they urge that it misapplied *Sony*. The court did not base its decision on *Sony*. It relied on the well-established standards for direct infringement that other courts have applied for over a decade, with none of the adverse consequences petitioners hypothesize. *Sony* is relevant only because it explains why petitioners did not (and could not) accuse Cablevision of *contributory* infringement: The underlying consumer copying here is lawful under *Sony*. If some future technology enables *illegal* copying, lower courts—and if necessary this Court—can address the matter in a case raising all available copyright liability theories. There is no reason to grant review based on hypothetical concerns in a case where the boundaries of contributory infringement were not tested and the underlying consumer conduct is perfectly lawful.

I. THE SECOND CIRCUIT'S RECORDING RULING DOES NOT WARRANT REVIEW

A. The Second Circuit Applied Settled Principles

1. The Copyright Act grants authors the exclusive right "to do" certain things, including "reproduc[ing] the copyrighted work in copies." 17 U.S.C. § 106 & 106(1). A person who "does" one of those things without permission or exemption is a direct infringer. See *id.* § 501(a); 7 *Patry on Copyright* § 25:87, at 25-240 (2008) ("Patry"). Because petitioners claimed only *direct* infringement—eschewing any claim that Cablevision contributed to illegal copying by consumers—the parties "agree[d]" that the dispositive question is "*who* makes the copies." Pet. App. 8a, 64a.

The petition's central claim is that, in answering that question, the Second Circuit erroneously "treated this case as though *Sony* supplied the controlling rule." Pet. 15; see *id.* at 18-20 (accusing the court of "[m]isreading *Sony*" and erroneously "[m]apping this case onto *Sony*"). But the court did not treat *Sony* as resolving "who" does the copying; it barely mentioned *Sony*. Instead, the court applied the text of the statute, common sense, and the legal standard followed by every court and leading treatise to have considered the issue.

The Second Circuit explained that, with a VCR, "the person who actually presses the button to make the recording" makes the copy, "not the person who manufactures, maintains, or * * * owns the machine." Pet. App. 20a-21a. Likewise, with a self-service photocopier, the customer who presses the button to operate the machine is the one who "makes" the copies—not the proprietor who owns, houses, and maintains the device. See *id.* at 22a. The RS-DVR is no different: When a subscriber uses the RS-DVR to record a program, it is the sub-

scriber who—by selecting the program and pressing the record button—"makes" the copies. See *id.* at 20a-23a.

In reaching that conclusion, the Second Circuit followed the standard—first articulated in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)—that courts across the country have consistently applied in fixing the "line between direct and contributory liability." Pet. App. 19a. That standard focuses on who engages in "volitional conduct" in making a copy. *Id.* at 20a. In *Netcom*, for example, the court rejected a direct infringement claim against an Internet service provider whose servers made copies in response to customer commands, "without any human intervention" by Netcom. 907 F. Supp. at 1368-1369. Direct infringement, the court held, requires an "element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." *Id.* at 1370. Although Netcom "design[ed]," "install[ed]," "maintain[ed]," and "operat[ed]" the servers, it "did not take any affirmative action that directly resulted in copying plaintiffs' works." *Id.* at 1368-1370.

The Fourth Circuit embraced that standard in *CoStar Group, Inc.* v. *LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). *Netcom*, the court held, "made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct—specifically, the act constituting infringement—to become a direct infringer." *Id.* at 551. Direct infringement requires that the defendant "himself [have] trespassed on the exclusive domain of the copyright owner." *Id.* at 550. The volition standard has also been endorsed by the Third Circuit, see *Parker* v. *Google, Inc.*, 242 F. App'x 833, 836-837 (3d Cir.

2007) (unpublished), myriad district courts,[2] and the leading treatises, see 3 Nimmer § 12B.01[A][1], at 12B-9 to -11; 2 Goldstein § 8.0, at 8:5-6.

The Second Circuit applied that same standard here. "*Netcom* and its progeny," the court observed, focus on who engages in "volitional conduct" in making a copy. Pet. App. 20a. Here, the customer, not Cablevision, supplies that volition: When a customer chooses a program and presses "record," the RS-DVR responds "automatically," "with no human intervention or decision-making" by any Cablevision employee—just like a VCR or photocopier does. C.A. App. 116, 119. Thus, the customer, not Cablevision, "does" the copying. See Pet. App. 18a-24a.

Even a quick glance at the Second Circuit's opinion makes clear that it rests on that well-established volition standard—not *Sony*. The only place the court even mentioned *Sony* was in a two-paragraph postscript *after* its conclusion that "the district court erred." Pet. App. 24a-26a.[3] And even there, it merely used *Sony* to illustrate that many of the factors petitioners invoke seem more relevant to contributory infringement. See *ibid.* Because the decision below did not turn on *Sony*, petitioners' complaint that the court "treated this case as though

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[2] See, *e.g.*, *Field* v. *Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006); *Newborn* v. *Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 n.3 (D.D.C. 2005); *Perfect 10, Inc.* v. *Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1167-1169 (C.D. Cal. 2002); *Marobie-FL, Inc.* v. *Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997); *Playboy Enters., Inc.* v. *Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512-513 (N.D. Ohio 1997); *Sega Enters. Ltd.* v. *MAPHIA*, 948 F. Supp. 923, 931-932 (N.D. Cal. 1996).

[3] Contrary to petitioners' claim (Pet. 19), the Second Circuit's analysis of who exercises volition when using a VCR (Pet. App. 20a-21a) is not a reference to *Sony*. The court was merely making the commonsense observation that, when a customer uses a VCR, the customer and not the VCR provider is "doing" the copying.

Sony supplied the controlling rule" (Pet. 15) is incorrect and provides no basis for review.

2. Petitioners' factbound challenges to the Second Circuit's application of those settled principles likewise do not warrant review. Petitioners urge that Cablevision "designed," "operates," and "maintains exclusive physical control" over the RS-DVR. Pet. 25. But that is precisely what courts have held insufficient to establish direct infringement. Netcom "design[ed]," "operate[d]," and "maintain[ed]" the system, but it was not a direct infringer. *Netcom*, 907 F. Supp. at 1368-1370. "'[V]olitional conduct' in designing and operating [a] service under the direction of * * * human management" (Pet. 25) is not volition *in making a copy*. If it were, every business that provides self-service photocopiers, set-top DVRs, or Internet service would be a direct infringer.

Nor does it matter that Cablevision operates the cable system that provides the licensed real-time television programming that its customers may choose to record. Pet. 27-28. "[F]urnish[ing] a copyrighted work to another, who in turn wrongfully copies from such work," is a classic example of "*contributory* infringe[ment]." 3 Nimmer § 12.04[A][3][b], at 12-86.1 (emphasis added); see also 2 Goldstein § 8.0, at 8:3. But it does not make the content-provider the one who "does" the copying. Libraries, for example, offer both books and photocopiers to their patrons. But no one would say the library "does" the copying when a patron uses the library's photocopier to duplicate pages from a library book. See 3 Nimmer § 12.04[A][3][b], at 12-88. Likewise, cable and satellite companies provide both television programs and set-top DVRs to 27 million subscribers. But those companies do not "do" the copying when subscribers record programs.

Besides, petitioners exaggerate Cablevision's role in providing content. Pet. 27. Cablevision selects channels to carry on its cable system, but it has "no control over

what programs are made available on individual channels or when those programs will air, if at all." Pet. App. 23a. And Cablevision makes those same channels available to subscribers who use VCRs, DVRs, or no recording devices at all. See *id.* at 23a, 53a. Cablevision's channel-selection decisions are thus far removed from any customer's decision to record a particular work.

3. Petitioners assert that the Second Circuit's test is inconsistent with the statutory text granting authors the exclusive right "to do and to authorize" various acts. Pet. 24-25. But petitioners never explain why the volition standard does not accurately reflect what it means "to do" the copying, as required for direct infringement. See p. 11, *supra*.[4] To the extent petitioners rely on the "to authorize" element—implying that Cablevision infringes by "authorizing" its customers to copy—their claim was neither pressed nor passed upon in the court of appeals, and for good reason: The "authorize" clause codifies doctrines of *secondary* liability, not direct infringement. See H.R. Rep. No. 94-1476, at 61 (1976); 2 Goldstein § 8.0, at 8:1-2; 3 Nimmer § 12.04[A], at 12-71 to -72; *Venegas-Hernandez* v. *ACEMLA*, 424 F.3d 50, 57-58 (1st Cir. 2005); *Subafilms, Ltd.* v. *MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1090-1095 (9th Cir. 1994) (en banc). Those are precisely the claims that petitioners waived by agreeing to allege only direct infringement. Pet. App. 61a.

Nor is there merit to petitioners' claim that Cablevision must be a direct infringer because it falls outside the

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[4] The volition standard is consistent with the principle that multiple defendants can directly infringe. Cf. Pet. 19 n.4. It simply requires that each defendant exercise volition in making the copy. The standard is also consistent with direct infringement's strict-liability status. Strict liability eliminates fault, not volition, as an element of liability. See *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring).

safe harbor of the Online Copyright Infringement Liability Limitation Act. Pet. 26. *CoStar* rejected that same argument, quoting the Act's express disclaimer: "'The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing * * * .'" 373 F.3d at 552-555 (quoting 17 U.S.C. § 512(*l*)); see also 3 Nimmer § 12B.06[B][1], at 12B-79; 6 Patry § 21:85, at 21-176. Congress included that language for the *precise purpose* of making clear that failure to qualify for the safe harbor does not preclude a non-infringement finding under cases such as *Netcom*. See S. Rep. No. 105-190, at 19 & n.20 (1998).

Far from being a "'special liability-limiting rule for Internet servers,'" the volition standard reflects the Act's fundamental distinction between those who "do" the copying and those who *contribute* to copying by others. See *CoStar*, 373 F.3d at 548-552. And while petitioners criticize lower courts for "treating *Netcom* as if it were a decision of this Court" (Pet. 28), *Netcom* merely applied the statutory standard. General agreement with its persuasive legal analysis is not grounds for review.

B. There Is No Conflict

1. Petitioners pair their assertion that the Second Circuit erroneously "mapped" this case onto *Sony* with the assertion that the Second Circuit ignored—and created a conflict with—*New York Times Co.* v. *Tasini*, 533 U.S. 483 (2001). Pet. 18-23. But *Tasini* involved an unrelated issue—"the rights of freelance authors and a presumptive privilege of their publishers" under 17 U.S.C. § 201(c). 533 U.S. at 487-488. That provision grants owners of collective works the privilege of reproducing the individual works making up the collective work *only* as part of the collective—not individually. See *id.* at 488.

The sole question in *Tasini* was whether that privilege was exceeded when the New York Times licensed electronic publishers like Lexis/Nexis to copy newspaper articles into computerized databases. See *id.* at 488-493. The Court held that the publishers had exceeded the privilege because the databases stripped the articles of context and presented them as individual works, not parts of a whole. See *id.* at 498-504. The notion that *Tasini*, a decision narrowly focused on Section 201(c), somehow resolved the unrelated question here—who "does" the copying—is fanciful.

Petitioners nevertheless insist that two sentences in *Tasini* support their position. Pet. 21-22. The cited passage rejected the publishers' argument that the plaintiffs could assert only contributory infringement because *customer* copying (in retrieving articles from the databases) determined whether the articles appeared as part of a collection. 533 U.S. at 504. The Court disagreed with the *premise* of that argument, concluding that the publishers had made (and then sold) their *own* infringing copies by copying the separate articles *into* the databases, wholly apart from any customer command: "The Electronic Publishers * * * are not merely selling 'equipment' [as in *Sony*]; they are selling copies of the Articles. And, as we have explained, it is the *copies themselves, without any manipulation by users*, that fall outside the scope of the § 201(c) privilege." *Ibid.* (emphasis added). That was precisely the plaintiffs' claim: "that their copyrights were infringed when [the publishers] *placed the Articles in the * * * databases*." *Id.* at 491 (emphasis added). That ruling says nothing about who "does" any copying when customers use an automated system to make copies. *No* court, in the seven years since *Tasini*, has ever read

those sentences as having addressed, much less settled, that issue.[5]

2. Nor does the decision below conflict with *Princeton University Press* v. *Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc). Petitioners urge that, under *Princeton*, a defendant "charged with *direct* infringement" cannot "'stand in the shoes of [its] customers'" by invoking their fair-use defense. Pet. 20-21 (quoting 99 F.3d at 1389) (emphasis added). But the Second Circuit nowhere held otherwise. It held that, because the customer and not Cablevision "does" the copying, Cablevision is not a direct infringer. *Id.* at 18a-24a. Moreover, as the Second Circuit explained (*id.* at 21a-22a), the defendant in *Princeton* was a *full-service* copyshop whose *employees* used the machines to make copies. See 99 F.3d at 1384. It was therefore undisputed that the employees were "doing" the copying.

Petitioners likewise err in claiming that the Fifth Circuit's unpublished, one-line *per curiam* affirmance in *Playboy Enterprises, Inc.* v. *Webbworld, Inc.*, No. 98-10097, 1999 WL 25053 (5th Cir. Jan. 8, 1999), conflicts with the decision below because it "refused to recognize" the *Netcom* principle. Pet. 28. *Webbworld* did not reject *Netcom*. It concluded that the defendant was liable under *Netcom*'s analysis because it took "'affirmative steps to cause the copies to be made'" by using software to "troll" the Internet for images, making illegal copies *without anyone else's involvement*. See 991 F. Supp.

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[5] Justice Stevens' statement that "[p]erhaps it would be more accurate to say that NEXIS makes it possible for *users* to make and distribute copies," 533 U.S. at 518 n.14, does not change the majority's analysis. The majority did not disagree with Justice Stevens' observation that users were the ones who retrieved articles; it disagreed with his premise that the articles did not infringe until they were retrieved. See *id.* at 504.

543, 552-553 (N.D. Tex. 1997) (quoting *Netcom*, 907 F. Supp. at 1381). That made the defendant a direct infringer: It was not "contributing" to someone else's copying; it was doing the copying itself. Petitioners themselves described *Webbworld* as one of the "*Netcom* cases" below. Turner C.A. Br. 38.

C. The Decision Below Does Not Immunize Automated Systems

Petitioners and their *amici* assert that the Second Circuit's ruling will "fundamentally distort * * * the exploding market for automated services" by "treating commercial intermediaries as presumptively immune from direct liability." Pet. 22. But they ignore the limited scope of the Second Circuit's ruling. The court answered only the narrow question presented: Who makes the copies with the RS-DVR—Cablevision (which designed, houses, and maintains the system) or the customer (who chooses what to record and uses the system to record it). In answering that question, the court applied the same standard that courts have applied for over a decade, without any of the disastrous consequences petitioners predict. And given the undisputed fact that customers make the copies when they use VCRs, self-service photocopiers, or set-top DVRs, the court's conclusion that customers likewise do the copying when they use the RS-DVR was unexceptional.

The Second Circuit, moreover, expressly preserved the possibility that "one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy." Pet. App. 26a. And the court's holding applies only to automated systems that another person uses to make copies—not all automated systems generally. See *id.* at 20a.

More fundamentally, virtually every claim that petitioners make is marred by their failure to appreciate that the Second Circuit did not rule on copyright liability generally—only direct infringement. As the court observed, where *illegal* copying occurs, secondary-liability doctrines "stand[] ready to provide adequate protection." Pet. App. 24a. This Court had no difficulty allowing a suit against illegal file-sharing networks in *Grokster*—not because the defendants "did" the copying, but because they *induced* copying by consumers. 545 U.S. at 941. The Court noted that the technology made it difficult to sue individual direct infringers, but viewed that as an "argument for imposing indirect liability," not for ignoring the traditional bounds of direct liability. See *id.* at 929-930. Courts have repeatedly invoked traditional contributory-infringement doctrines to shut down automated systems used for illegal copying. See, *e.g.*, *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In *Netcom* itself, the court allowed a contributory-infringement claim. 907 F. Supp. at 1373-1375. As Professor Goldstein explains, the proliferation of "digital technologies for the storage, retrieval and transmission of entertainment and information" "underscore[s] the importance of *secondary* liability doctrines in the twenty-first century." 2 Goldstein § 8.0, at 8:2 (emphasis added).

Here, petitioners could not allege contributory infringement because consumer time-shifting is lawful. But that hardly makes the decision below momentous. New technologies that facilitate *lawful* consumer conduct should be encouraged, not prohibited. While petitioners accuse Cablevision of "exploit[ing]" their works (Pet. 19), nothing in the Copyright Act gives authors the right to demand royalties from every business that merely enables *lawful* fair use of their works. In the unlikely event that the decision below spawns *illegal* copying, there will

be time enough for this Court to act. But there is no reason to grant review in a case involving *lawful* consumer time-shifting based on petitioners' dubious predictions. Moreover, the parties' stipulations—petitioners' agreement to claim only direct infringement and Cablevision's agreement to waive its fair-use defense—render this dispute an unsuitable vehicle for resolving broader questions about the lawfulness of automated technologies.

If any rule would "fundamentally distort" the market, it is petitioners'. They never explain how a court could deem Cablevision a direct infringer without also banning the 27 million set-top DVRs that cable and satellite companies already provide. Those companies similarly provide both television programs and recording equipment, retain ownership of the equipment, prevent access to its contents, and limit subscribers' use, all in the context of an ongoing relationship. See p. 4, *supra*. The only real difference is where the recordings are stored. But that makes no difference to who "does" the copying. Petitioners' implicit assumption that a standard DVR or VCR is lawful but the RS-DVR is not cannot be reconciled with the goal of "technology-neutral copyright law" that their own *amici* purport to champion. Copyright Alliance Br. 13.

II. The Second Circuit's Buffering Ruling Does Not Warrant Review

Petitioners also seek review of the Second Circuit's buffering decision. But that decision is correct; it creates no circuit split; and this case is not an appropriate vehicle for review.

A. The Second Circuit's Ruling Conforms to the Statute's Text

The Copyright Act grants authors the exclusive right "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). "Copies" are "material objects * * * in which a

work is fixed." *Id.* § 101. And a work is "fixed" only if its "embodiment in a copy * * * is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.* Congress imposed that limitation in order to "exclude * * * purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television * * * , *or captured momentarily in the 'memory' of a computer.*" H.R. Rep. No. 94-1476, at 53 (emphasis added).

The Second Circuit's holding that RS-DVR buffer data is not a "copy" under that standard was plainly correct. *All* digital devices—cell phones, digital microphones, digital televisions, set-top DVRs—momentarily buffer data as it is processed and routed. See Pet. App. 54a. The RS-DVR is no exception. It briefly stores tiny snippets of incoming program data in a "BMR buffer" to modify the transmission rate. See *ibid.* That buffer "holds no more than 1.2 seconds of programming at any time," and it holds that data for no more than 1.2 seconds. See *id.* at 5a. Data in the RS-DVR's "primary ingest buffer" is more fleeting still—that buffer holds no more than 0.1 seconds of programming at a time, for no more than 0.1 seconds. See *ibid.* The data in those two buffers—which is overwritten the moment after it is created as data constantly streams through—clearly does not last "for a period of more than transitory duration." 17 U.S.C. § 101. It is precisely the sort of "purely evanescent or transient reproduction[] * * * captured momentarily in the 'memory' of a computer" that Congress intended to exclude. H.R. Rep. No. 94-1476, at 53.

Petitioners offer no coherent response. They fault the court of appeals for adopting a "durational requirement." Pet. 17. But that is exactly what the statute's "for a period of more than transitory duration" clause imposes. And while petitioners urge that the "transitory duration"

clause is too remote from the word "embodiment" to modify it, Pet. 32, the clause immediately follows the phrase it modifies: It defines the minimum period for which something must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 101.

Petitioners argue that, so long as an embodiment lasts long enough "to permit the work's perception, reproduction, or communication," it is a copy. Pet. 30-31. But that is what the statute would say if the "transitory duration" clause were not there—if the Act covered *any* reproduction that was "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated." Congress added to the end of that clause the phrase "for a period of more than transitory duration." That phrase must mean something, but petitioners simply read it out of the statute.[6] For that reason, the Second Circuit properly declined to follow the Copyright Office's 2001 *DMCA Report*, which proposed a similar dividing line. See Pet. App. 15a-16a. "[T]he Office's interpretation does not explain why Congress would include language in a definition if it intended courts to ignore that language * * * ." *Id.* at 16a.

The Second Circuit's disagreement with a non-binding report would not justify review under any circumstances. But the Office is now reconsidering its position, acknowledging the "Second Circuit's reminder that the fixation requirement does require an element of duration" and conceding that its prior position was intended to be "pro-

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[6] Petitioners do not renew their argument below that the "transitory duration" clause measures how long a recording *created from* the buffer data must last. Turner C.A. Br. 49-50. That unnatural reading is contrary to the legislative history. Images "projected briefly on a screen" can be filmed and then stored indefinitely, but Congress intended to exclude them. H.R. Rep. No. 94-1476, at 53.

vocative." U.S. Copyright Office, *Public Hearing: Section 115 Notice of Proposed Rulemaking* 3:11-12, 11:3-4 (Sept. 19, 2008). The Office has not yet decided "whether the Second Circuit's critique of the Office's analysis is compelling." *Compulsory License for Making and Distributing Phonorecords*, 73 Fed. Reg. 66,173, 66,177 (Nov. 7, 2008).[7]

Besides, the Copyright Office's *DMCA Report*, while deeming buffer data to be fixed, concludes that buffering is likely *lawful fair use*. See U.S. Copyright Office, *DMCA Section 104 Report* 133-141 (Aug. 2001). Professor Goldstein reaches a similar result under the *de minimis* doctrine (which provides an alternative ground for affirmance, see Pet. App. 18a). See 2 Goldstein § 7.0.2, at 7:9. Thus, the only real dispute is over *which theory* renders transient data buffers lawful—not *whether* they are lawful. Petitioners may urge that Cablevision gave up the fair-use theory the Copyright Office endorsed. But that only highlights why this is not a proper vehicle for review. Any decision that addressed the legality of buffering without addressing fair use could only sow needless uncertainty in the law.

Petitioners finally suggest that, even if other transient data buffers are lawful, the BMR buffer is not because "1.2 seconds is not 'fleeting' for a computer." Pet. 31. That argument was not preserved. Petitioners claimed below that there was *no* durational requirement (beyond

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[7] *Amicus* NMPA argues that the Second Circuit's holding interferes with the Copyright Office's Section 115 rulemaking. See NMPA Br. 16-20. But two days after NMPA filed that brief, the Office issued its interim rule, explaining that it did not need to resolve the buffering issue. See 73 Fed. Reg. at 66,177. Moreover, NMPA has characterized the Second Circuit's decision as "highly fact-dependent" and thus lacking broader significance. NMPA Section 115 Comments 11-12 (Aug. 28, 2008), http://www.copyright.gov/docs/section115/comments-3/rm2000-7_nmpa_sga_nsai_aimp.pdf.

the capability of being perceived, reproduced, or otherwise communicated). But they never argued that, if such a requirement exists, 1.2 seconds is too long. There is no reason for this Court to address the factbound issue of whether this particular buffer data lasts for a "more than transitory duration," especially absent a lower-court decision addressing the issue.

B. There Is No Circuit Conflict

The only other court of appeals to have addressed transient data buffers reached the same conclusion as the decision below. In *CoStar*, the Fourth Circuit ruled that, "[w]hen an electronic infrastructure is designed and managed as a *conduit* of information," the "temporary electronic copies [that] may be made in this transmission process * * * would appear not to be 'fixed' in the sense that they are 'of more than transitory duration.'" 373 F.3d at 550-551. The buffer data here is precisely the sort of temporary storage incident to transmission that the Fourth Circuit described.

Petitioners assert a conflict with *MAI Systems Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), and its progeny. Pet. 29-32. But they ignore the Second Circuit's thorough discussion of those cases. See Pet. App. 11a-15a. As the court explained, the parties in *MAI* disputed only whether data in computer memory could *ever* be "fixed"—not whether the *particular data in that case* lasted long enough to be fixed. See 991 F.2d at 517-519. That is unsurprising. The case did not involve fleeting buffer data. It involved data that resided in memory long enough for a technician to "view the system error log and diagnose the problem with the computer." *Id.* at 518. The data was thus "embodied in the RAM for at least several minutes." Pet. App. 13a; see *Advanced Computer Servs. of Mich., Inc.* v. *MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994). None of the decisions invoked by

petitioners involved the sort of truly fleeting buffer data at issue here—data that exists for only a flash and then is gone.

III. The Second Circuit's Public Performance Holding Does Not Warrant Review

Petitioners assail the Second Circuit's public performance ruling as "profoundly destabilizing." Pet. 36-37. But allowing a customer to play back his *own* recording, that *he* made, to *himself and no one else* is not a "public" performance in any sense. And the decision will have none of the effects that petitioners predict.[8]

A. The Second Circuit's Ruling Accords with the Statutory Text and Common Sense

1. A person "performs" an audiovisual work by "show[ing] its images in any sequence." 17 U.S.C. § 101. And, under the statutory definition at issue here, a person performs a work "publicly" if he "transmit[s] * * * a performance * * * of the work * * * *to the public*." *Ibid.* (emphasis added). Accordingly, there is no invasion of the public performance right unless the transmission of a performance is "to the public."

Just like a VCR or set-top DVR, the RS-DVR permits customers to record live programming and play back their own recordings to themselves in their homes. Although the RS-DVR, unlike those other technologies, plays back a recording by means of a transmission, there still is no *public* performance unless the transmission is "to the public." As the Second Circuit concluded, an RS-DVR transmission is no more "public" than a VCR or set-top DVR playback: In each instance, there is a "potential audience" of one—the person who made the recording.

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[8] The Second Circuit did not reach Cablevision's argument that the customer, not Cablevision, "does" the performing—an alternative ground for affirmance. See Pet. App. 28a.

See Pet. App. 36a, 39a. "[I]f a transmission is only available to one person, then it clearly fails to qualify as 'public.'" 2 Nimmer § 8.14[C][2], at 8-190.6.

2. Petitioners call attention to the portion of the statutory definition stating that a transmission of a performance can be "to the public" "whether the members of the public capable of receiving the performance * * * receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. Petitioners insist that RS-DVR playback is a public performance because customers receive performances at separate places and different times. Pet. 33-34. But the separate places/different times clause does not expand the statute beyond transmissions of performances "to the public." It merely clarifies that, *if* a transmission of a performance is "to the public"—*i.e.*, generally available—it is not artificially excluded from coverage merely because only one person actually receives it at a time. See 17 U.S.C. § 101.

Indeed, the separate places/different times clause confirms that the size of the "potential audience" is what matters. As the Second Circuit explained, "[t]he implication from this same language * * * is that it is relevant, in determining whether a transmission is made to the public, to discern who is 'capable of receiving' the performance being transmitted." Pet. App. 29a (quoting 17 U.S.C. § 101). The legislative history confirms that focus, stating that a performance is public where "the transmission is *capable* of reaching different recipients." H.R. Rep. No. 90-83, at 29 (1967) (emphasis added).

The separate places/different times clause thus encompasses video-on-demand ("VOD") systems in which a provider selects a library of recorded content and makes it available via transmission to anyone willing to pay. See C.A. App. 771, 1180-1182. Such systems fall within the statutory definition because any member of the public

willing to pay is "*capable* of receiving" a transmission of a performance from the provider-procured copy of the work in the library. With the RS-DVR, by contrast, "the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." Pet. App. 36a.[9]

Ordinary meaning supports that distinction. Something is "public" if it is "[o]pen or available for all to use, share, or enjoy." *Black's Law Dictionary* 1264 (8th ed. 2004); see *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438-439 (1973). That is true even if it is actually used on a one-at-a-time basis. A phone booth is "public" because anyone willing to pay can use it—even though only one person occupies it at a time. But a house open only to the person who built it is not "public." Similarly, videos in a VOD library are offered "to the public" via transmission because anyone willing to pay can view them—even though, once a transmission begins, only one person actually receives it. But RS-DVR recordings are not available "to the public." Each one is available for transmission solely to the customer who made it. Pet. App. 36a.

Nor does it matter that multiple RS-DVR subscribers could happen to record and play back the same television programs (*i.e.*, the same "works"). As the Second Circuit stated, what matters under the statute is whether a particular *transmission of a performance of a work* is made publicly available—not whether the *work itself* is publicly available. See Pet. App. 31a-32a; H.R. Rep. No. 90-83, at

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[9] Petitioners urge that the RS-DVR uses a "VOD network" and "VOD architecture." Pet. 8. But what matters is the technology's application, not its provenance. A commercial movie projector in a public theater renders public performances. But if the owner takes that projector home to watch movies by himself, that is a private performance.

29; 2 Nimmer § 8.14[C][2], at 8-190.6. Because an RS-DVR playback is available only to the person who made the recording, the transmission is private, not public.[10]

B. There Is No Circuit Conflict

Contrary to petitioners' contention (Pet. 34-36), the decision below fully accords with *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), and the other cases that followed *Redd Horne* on analogous facts. The Second Circuit expressly embraced *Redd Horne* and correctly concluded that its rationale precludes liability on the facts here. Pet. App. 37a-39a.

In *Redd Horne*, a video store transmitted movies to patrons in viewing booths. The court held those performances "public" because "[a]ny member of the public [could] view a motion picture by paying the appropriate fee." 749 F.2d at 159. The court found "particularly pertinent" Professor Nimmer's statement that "'*if the same copy* * * * of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance.'" *Ibid.* (quoting 2 *Nimmer on Copyright* § 8.14[C][3], at 8-142 (1983)). "It is *only* when the *same copy of a given work* gives rise to numerous performances by different members of the public that each such performance * * * will be regarded as a public performance, because the public at large receives performances 'at different times,' *all emanating from the same copy*." 2 Nimmer § 8.14[C][3], at 8-192.2(2) (emphasis added). The Third Circuit found that standard met because, "[a]lthough [the

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[10] Petitioners and *amici* argue that the Second Circuit permitted an "end run around the limitations of [the] § 111 license." Pet. 38; see MLB Br. 6-20. But Section 111 permits certain simultaneous retransmissions that would otherwise be infringing public performances. See 17 U.S.C. § 111(c), (f). It does not convert private performances into public ones.

video store] has only one copy of each film, it shows each copy repeatedly to different members of the public." 749 F.2d at 159. As the Second Circuit explained, *Redd Horne*'s own reasoning distinguishes the RS-DVR: Because no subscriber's recordings are ever shown to anyone but the subscriber himself, the performances are private. See Pet. App. 37a-39a.

That distinction is critical under a statute focused on "transmi[ssion] [of] * * * a performance" of a work "to the public." Where a defendant has one copy of a work and offers to play it for anyone willing to pay a fee, the transmissions are "to the public" because anyone can receive them. By contrast, where an individual purchases or records his own copy and can play it only to himself, the transmission is *not* generally available. If 100 consumers each purchased the same Miles Davis song from Apple's iTunes store, separately stored the song on Apple's .mac remote-storage backup service, and separately listened to their respective copies of the song by streaming the song to themselves from the remote server, no one would think Apple had publicly performed the song. The RS-DVR is no different.

No court has ever rejected the interpretation that *Redd Horne*, Professor Nimmer, and the court below all followed. Congress's carefully crafted language preserves the distinction between public performances and private ones. Petitioners' construction obliterates it.[11]

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[11] *Amici* suggest that the Second Circuit's decision conflicts with certain treaties. See BMI/ASCAP Br. 21-24; Sony BMG Br. 24-27. But even the broadest treaty applies only to "*communication[s] to the public* of [the author's] works, * * * including the making available to the public of their works [on an on-demand basis]." WIPO Copyright Treaty, art. 8, Dec. 20, 1996, 36 I.L.M. 65, 70 (emphasis added). Just as the RS-DVR does not make transmissions of performances "to the public" under the Copyright Act, it does not make "communication[s] to the public" under that treaty.

C. Petitioners' Claims of Impact Are Unfounded

As the foregoing makes clear, petitioners and their *amici* misread the Second Circuit's decision when they insist it will lead to unlicensed video-on-demand and similar services. See Pet. 36-38; BMI/ASCAP Br. 6-11. Such services clearly transmit content "to the public" under the Second Circuit's reasoning. See pp. 27-28, *supra*.

Petitioners hypothesize a video-on-demand system that automatically makes a *separate copy* of each requested program for each customer from its central library and then transmits a performance to the customer from that separate copy. Pet. 37. That petitioners' claim of importance derives from a *hypothetical* system underscores the absence of any pressing need for review. And the Second Circuit explained why such a system would not work: The operator would still face direct or contributory liability for the unlawful reproductions. Pet. App. 41a-42a. As *Grokster* makes clear, consumers have no general right to duplicate copyrighted works from the collections of others. The RS-DVR is different because consumers do have a right to record television programs as they air for later viewing under *Sony*. Even for purposes of the public performance right, a transmission system built on a central library of provider-procured copies is not analogous to the RS-DVR, which does no more than allow consumers to play back their own lawfully recorded time-shifting copies, just like a VCR or standard DVR. Finally, if anyone ever offers petitioners' hypothesized VOD system in the face of such potential liability, courts can address the legality of the system at that time. There is no reason to grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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